FILE COPY

Office Supreme Court, U.S.
FILED
DEC 18 1958
JAMES R. BROWNING, Clerk.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 530

OWEN GOFF, JR., by Owen Goff, Sr., his father and next friend,

Petitioner,

vs.

SEARS, ROEBUCK AND COMPANY, a corporation,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

L. H. VOGEL
ROBERT B. JOHNSTONE
105 South LaSalle Street
Chicago 3, Illinois
Attorneys for Respondent

CHICAGO LAW PRINTING CORPORATION, 189 W. MADISON, CHICAGO - FRANKLIN 2-8521

SUBJECT INDEX

	PAGE
Question Presented	7
Reasons for Denial of the Writ	7
Statement of the Case	1
Erie R.R. Co. v. Tompkins	2
Petitioner's Theory Below	2
The Evidence	3
The Instructions	5
Argument	8
I. The Court of Appeals Correctly applied the Indiana Law in its Decision in this case.	8
II. The Court of Appeals did not Find Error in the Instructions on Grounds Not Advanced in the Trial Court.	12
III. There is No Basis for the Reversal of the Judgment in the Exercise of This Court's Supervisory Powers.	12
Conclusion	13

CASES CITED

PAGE

American Carloading Corp. v. Gary Trust and Savings Bank, 216 Ind. 649, 662, 663 ..... 8, 9, 10

Duffy v. Cortesi, 2 Ill. 2d 511, 516 11

Erie R.R. Co. v. Tompkins, 304 U.S. 64 ..... 1, 2, 7

Indianapolis Traction & Terminal Co. v. Matthews, 177 Ind. 88, 105 11

Keeshin Motor Express v. Sowers, 221 Ind. 440, 446 ..... 10, 11

Pfisterer v. Key, 218 Ind. 521, 531; 33 N.E. 2d 330, 331 ..... 4, 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 530

OWEN GOFF, JR., by Owen Goff, Sr., his father and next friend,

Petitioner,

vs.

SEARS, ROEBUCK AND COMPANY, a corporation,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Petitioner's jurisdictional statement is substantially correct. However, Petitioner's Statement (Pet. p. 2) is inaccurate and incomplete.

STATEMENT.

In striving to present a parallel between *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, and the situation at bar, Petitioner has, perhaps unwittingly, misdescribed the factual and legal background of the *Erie* case. Moreover, Petitioner has taken liberties with the record here, in asserting that Respondent's driver "admittedly saw Petitioner (Pet. p. 3)."

The Circuit Court of Appeals did not "upset the judgment (Pet. p. 3)" in *Erie R.R. Co.* v. *Tompkins*. On the contrary, it affirmed a judgment on the verdict for plaintiff in the sum of $30,000 (90 F. 2d 603, 604; 304 U.S. 64, 70). Tompkins was not, as Petitioner indicates (Pet. p. 3) "walking along a large traffic artery" in the highway sense. He was using a longitudinal pathway along the railroad right of way. This Court took the *Erie* case because the Circuit Court of Appeals, following *Swift* v *Tyson*, 16 Pet. 1, 18, refused to consider the railroad's claim that under Pennsylvania law no duty other than to abstain from wilful and wanton injury was owed to Tompkins. No question of jury instructions was involved. In its opinion, this Court denied the existence of any general Federal common law applicable to diversity cases, and directed the Circuit Court of Appeals to consider and determine the state of the applicable Pennsylvania law. After reversal, the Circuit Court of Appeals in *Tompkins* v. *Erie R.R. Co.*, 98 F. 2d 49, finding that the railroad's view of the Pennsylvania law was correct, remanded the case to the District Court with directions to enter judgment for defendant.

Petitioner's Theory Below.

Petitioner's original Complaint in this case alleged that he was walking southerly on the east berm (shoulder) of U. S. Highway 41, near Cook, Indiana, when the accident occurred (App. 3). Just before trial, the Complaint was amended to allege that Plaintiff was walking in the parkway separating the northbound and southbound sections of the highway, not on the "berm" (App. 16). Plaintiff's whole case was presented in the trial court upon the theory that he was *not upon the highway* when struck (Amended Complaint Par. 10 (A)-(L); App. 17).

The Evidence

Petitioner testified that he was in the parkway about one foot west of the pavement when he was hit (App. 335). He admitted that he had seen the trucks approaching from his rear, not once, but twice (App. 332, 333). Petitioner further admitted that after observing the approaching trucks the second time, he continued to walk along the left side of the highway "just a few steps" (App. 401-402).

Respondent's driver did not admit he saw Petitioner. Petitioner's statement (Pet. p. 3) "the driver * * * admittedly saw the Petitioner at a distance of 30 feet or more (App. 554, 555)" is not justified by the record pages referred to, nor is it warranted by anything in the record.

This driver, Earl Peifer, who was driving south on the inner lane of U. S. Highway 41, testified (App. 534) that up to the time he came upon him (plaintiff) he hadn't seen anything but the Foster truck (the truck alongside him) on the highway. Peifer went on: "The next thing I was just almost up alongside of him and I seen *something*. Then I hit the brakes * * *. I saw something up there. I did not know for sure what it was * * *. It was about a foot on the road * * * about to the left front fender of the tractor."

The driver of the Foster truck (which Peifer was passing) testified he didn't see any pedestrian * * * I never seen that person on the highway, never entered my mind." (App. 617).

On cross-examination Peifer, Respondent's driver, wasn't asked whether he saw Petitioner. He was asked how far ahead he could see an object in front of his headlights such as a man or big boy standing up and walking along. His reply was "I don't really know in feet." On being asked for an "estimate" he then said "I would guess possibly 30 feet, maybe further." (App. 554)

Again (App. 556) he was asked "Did you see a human being on the road at any time before your truck hit him?" and Peifer replied "All I seen was an object. I don't know what it was." He was subsequently asked: "Did you see anything 30 feet ahead of you, sir, or 50 feet ahead of you that night before you struck it", to which he replied "I would say possibly 30 feet."

Deputy Sheriff Peters of Lake County, Indiana, who investigated the accident, testified that there were tire marks where the vehicle had pulled off the road within the immediate vehicle itself (App. 117), 100 feet or more beyond the scene of the occurrence (App. 117, 537). The accident occurred about midnight (App. 112). Plaintiff had been up and down the road for a period of a year or more at the time of the occurrence, and was wearing a green shirt and matched pants—the uniform of a filling station attendant (App. 328).

On this state of facts, the Court of Appeals for the Seventh Circuit, in its opinion, held that "Considering the manner in which the Appellee was dressed, the fact that it was night and the highway dark, it is a close question of fact whether or not (with due consideration to the duty of the driver to exercise reasonable care in keeping a lookout for pedestrians) Appellee was guilty of contributory negligence which would bar his recovery. It was nevertheless, a question of fact for the jury. *Pfisterer* v. *Kew*, 218 Ind. 521, 531; 33 N.E. 2d 330, 331." (Pet. App. p. 6a).

In commenting upon the necessarily prejudicial effect of the erroneous portions of the trial court's charge, the Court of Appeals further stated in its opinion (Pet. App. 8a): "As we have previously indicated this case turns upon a close question of liability which the trial court properly left for the jury to determine.

The Instructions

Petitioner made no reference in his statement to other instructions presenting Petitioner's theory of the case, included in the Court's charge.

By Plaintiff's Instruction No. 1 (App. 681), the jury was told of the Indiana horn blowing statute which required a driver to give audible warning where reasonably necessary to insure safe operation, and peremptorialy directed a finding of guilty if the jury should find it was reasonably necessary to give that warning, and defendant negligently failed to do so, thus proximately causing the accident.

By Plaintiff's Instruction No. 13 (App. 681, 682), the jury was advised of the Indiana headlight statute and again were peremptoriiy directed to return a verdict of guilty if defendant's lights were not so aimed or of sufficient intensify to reveal a person at least 100 feet ahead, thus negligently proximately causing the accident. By Plaintiff's Instruction No. 12 (App. 683), the jury were again peremptorily directed to return a verdict of guilty if defendant was operating its vehicle at a speed greater than is reasonable and prudent under the conditions and actual and potential hazards then existing which negligently and proximately caused the accident.

We take issue with Petitioner's claim (Pet. p. 6) that the Court of Appeals found error in Instructions 15 and 16 "*but not on the grounds offered by Respondent.*"

Petitioner is here seeking to show that the Court below refused to apply Indiana law, in part, by lifting portions of its opinion out of context. The Court of Appeals actually decided the case on the very "grounds" urged by Respondent.

Thus, as to Instruction No. 16, the Court of Appeals said (Pet. App. 7a):

> "This instruction was objected to on the ground that there was no evidence in the case to indicate that defendant was under an obligation to sound a horn. *The testimony of appellee himself was that he was fully aware of the position of the approaching trucks a short distance from him.* The evidence further shows that appellee walked with his back to traffic in the night dressed in dark clothing. Under such circumstances it is more than a possibility that the truck driver would not have seen appellee in time to stop or give a signal even though he used such diligence in the exercise of reasonable care as would enable him to observe pedestrians on the highway. *American Carloading Corp. v. Gary Trust Savings Bank, Admr.*, 216 Ind. 649, 657, 25 N.E. 2d 777, 781 (1940). It is difficult to see how, under such circumstances, there could have been any duty on the part of the driver to sound the warning." (Italics by the Court)

And as to Instruction 16, the Court of Appeals said (Pet. App. 8a):

> "Plaintiff's instruction 16 also directed a finding of guilty if the jury should find under the court's instructions that the driver, by using his faculties, could and would have discovered appellee in time to avoid striking him and 'that he negligently failed to do so, as charged in the plaintiff's complaint and as elsewhere set forth in these instructions.' It is urged by appellant that by referring to the complaint and other instructions summarizing the pleadings, the court permits the assumption by the jury that there is evidence to support the charges. The instruction is, we believe, prejudicial when considered together with instruction 15."

QUESTION PRESENTED.

There is actually only one question presented here: Whether, in view of all of the facts and circumstances in the case, the judgment of the Court of Appeals correctly reversed and remanded the cause for a new trial because of prejudicial error in the Court's charge. Petitioner's claim that the Court of Appeals adopted grounds for error not assigned in the trial court is without substance.

REASONS FOR DENIAL OF THE WRIT.

The Court of Appeals correctly applied the applicable Indiana Law as illustrated by the very authorities relied upon by Petitioner, in the light of all the facts and circumstances in the case. There is no conflict here with *Erie R.R. Co.* v. *Tompkins*, 304 U.S. 64, or any other decision of this Court or other Courts of Appeals. (Pl.)

ARGUMENT

I.

THE COURT OF APPEALS CORRECTLY APPLIED THE INDIANA LAW IN ITS DECISION IN THIS CASE

The Court of Appeals correctly applied the substantive law of Indiana in this case. It did so to the detriment of Respondent, who urged strenuously in that Court that its motion for judgment notwithstanding the verdict should have been granted in the trial court because Petitioner, who saw the approaching vehicles not once, but twice, continued to walk along the side of the highway in the same direction as traffic, notwithstanding the indistinguishable clothing he was wearing.

In *Pfisterer* v. *Key*, 218 Ind. 521 and *American Gas Loading Corporation* v. *Gary Trust and Savings Bank*, 216 Ind. 649, the Supreme Court of Indiana was principally concerned whether defendant's motion for judgment notwithstanding the verdict or defendant's motion for a new trial on the ground that the verdict was contrary to law should have been granted.

In *Pfisterer* v. *Key*, 218 Ind. 521, a 15-year old boy who was killed, was walking on the left side of the road, facing oncoming traffic at 7:30 p.m. on June 21 (218 Ind. at 526). The companion of the driver of the car testified that he saw the boy when he turned a curve, but did not see him thereafter until immediately prior to the accident. The driver testified that he did not see the boy until the front of the car was within 15 to 20 feet of him and that at that time the boy was walking with his head downward and the driver testified that he did not think the boy saw or heard the approach of the car and that at that time there was insufficient time to sound a horn or to give other signal

The question decided by the court was whether the boy was guilty of contributory negligence as a matter of law. The court held that while there was no question in that case as to the negligent conduct of the driver of the automobile (his companion had seen the boy), with respect to the decedent, since there was no obstruction between the two the jury had a right to infer that the decedent did see and hear the car and had a right to assume that the driver had seen him and would drive accordingly.

American Carloading Corp. v. Gary Trust & Savings Bank, Admr., 216 Ind. 649, arose out of an accident in which the decedent was killed while walking along the right side of 5th Avenue in the City of Gary, Indiana. At this place in the city no sidewalks were provided for pedestrians. There was evidence from other witnesses as to the condition of the way with respect to obstructions and the like. Thus the truck driver stated he could have seen a person 200 feet ahead of him if his vision had not been obstructed by an intervening automobile; however one of plaintiff's witnesses testified that he watched the truck go by and followed to the point of the accident and (216 Ind. 659) "that while he was waiting for the trucks to pass no other automobiles passed east on the street, preceded the trucks or passed him or the trucks while he was trailing them." On this state of the record the jury specifically found in answer to interrogatories that the operator of the truck did not keep a lookout ahead of his truck; that decedent was in plain view of the driver at the time; and that the driver could have stopped the truck and avoided the accident. In the case at bar, of course, petitioner admittedly knew that the trucks were approaching. In the *American Carloading* case there was no such proof (216 Ind. 656).

The *American Carloading* case involved a given instruction somewhat similar to Instruction No. 15 at bar, with one very significant difference. The instruction held proper by the Supreme Court of Indiana contained the language (216 Ind. 249 at p. 261):

> "If you find from the evidence that the driver of defendant's truck that struck the decedent * * * could have seen the decedent walking ahead of his truck for a distance of 200 feet."

The failure of Instruction 15 at bar to include language similar to this was the principal ground for objection urged to that instruction in the trial court; *i.e.* there is no evidence in this case that defendant's driver was under an obligation to sound a horn by reason of any facts known to him prior to the time when the sounding of a horn would be too late (App. 628), which was adopted by the Court of Appeals when it determined (Pet. App. 7a) "Under such circumstances it is more than a possibility that the truck driver would not have seen the appellee in time to stop or give a signal, even though he used such diligence in the exercise of reasonable care as would enable him to observe pedestrians on the highway."

This instruction is peremptory—it directs a finding of guilty. Since it does not include all of the elements essential to such a finding, the vice in the instruction is basically a matter of procedure, not of substantive law. From a procedural standpoint as to such instructions in Indiana, as in Illinois, in accordance with the prevailing general rule, the law is the same: Peremptory instructions are not favored (*American Carloading Corp.* v. *Gary Trust and Savings Bank*, 216 Ind. 649, 662, 663; *Keeshin Motor Express* v. *Sowers*, 221 Ind. 440, 448) "Where * * * the instruction is peremptory in character and directs a verdict

for either party, it must necessarily contain all the facts and be complete within itself; it cannot be cured by any other instruction in the series." (*Duffy* v. *Cortesi*, 2 Ill. 2d 511, 516). *Indianapolis Traction & Terminal Co.* v. *Matthews*, 177 Ind. 88, 105, and *Keeshin Motor Express* v. *Sowers*, 221 Ind. 440 446, are to the same general effect.

Instruction No. 15 in the form given by the District Court directed the jury to find defendant guilty even though the jury did not find that Respondent's driver either saw Petitioner or could have seen him in time to slow down or sound warning. In a case in which Petitioner's whole theory was that he was not even on the highway, in which Petitioner admitted seeing and being conscious of the approaching trucks, and in which there is no substantial evidence that Respondent's driver saw or could have seen Petitioner in time to avoid the occurrence, the instruction was unquestionably erroneous and prejudicially so.

The case was not tried either in the trial court or in the Court of Appeals on any theory of "last clear chance." Of course, even aside from this, no such theory is properly involved in the instruction being considered and it was for this reason that the instruction itself was erroneous. The doctrine of "last clear chance" presupposes an opportunity on the part of Respondent's driver to avoid the occurrence, and no such element was included in the instruction as tendered and given. (App. 680)

The error in Instruction No. 16 is obvious. This too, was a peremptory instruction, and far from containing within itself all of the facts necessary to establish liability, referred the jury to plaintiff's complaint and to the other instructions, including Instruction No. 15, for the purpose of determining what action on the part of Respondent's driver would warrant a finding of guilty. The

instruction was objected to in the trial court on this specific ground. (App. 628) The Court of Appeals correctly held that the prominence thus unduly given to plaintiff's theory, necessarily prejudiced Respondent.

II.

THE COURT OF APPEALS DID NOT FIND ERROR IN THE INSTRUCTIONS ON GROUNDS NOT ADVANCED TO THE TRIAL COURT.

As we have already pointed out, the assertion that the Court of Appeals found error in the instructions on grounds not advanced to the trial court, represents an interpretation of counsel not warranted by the opinion in the case.

What Petitioner has done is to look to the reasons advanced by the Court of Appeals for finding prejudice in the instructions and to interpret these as constituting the grounds upon which error was found. In our statement, we have submitted verbatim the applicable portions of the Court of Appeals' decision on this point. The Court of Appeals' opinion in this regard does not warrant the construction placed upon it by Petitioner.

III.

THERE IS NO BASIS FOR THE REVERSAL OF THE JUDGMENT IN THE EXERCISE OF THIS COURT'S SUPERVISORY POWERS.

As we believe we have demonstrated, the Court of Appeals' opinion in this cause was not erroneous in the respects criticized by Petitioner. There is, therefore, of course, no occasion for any exercise of this Court's supervisory powers.

CONCLUSION.

For the reasons heretofore set forth, Respondent respectfully submits that the Petition for Writ of Certiorari to the Court of Appeals for the Seventh Circuit should be denied.

Respectfully submitted,

L. H. VOGEL
ROBERT B. JOHNSTONE
Attorneys for Respondent